

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MENACHEM VINTER	:	AMENDED
	:	DETERMINATION
	:	DTA NO. 816928
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period April 9, 1997.	:	

Petitioner, Menachem Vinter, 34 Martin Court, Kingspoint, New York 11024-1620, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period April 9, 1997.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 25, 1999 at 10:15 A.M., with all briefs to be submitted by March 31, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUE

Whether petitioner was a person in possession of or had control of unlawfully stamped cigarettes and, as such, is liable for the penalty imposed pursuant to Tax Law § 481(1)(b).

FINDINGS OF FACT

1. On April 9, 1997, investigators from the Division of Taxation ("Division") conducted a routine inspection of a Getty gasoline station located at 1134 East New York Avenue, Brooklyn, New York. The owner of the business was Meir, Inc., which was wholly

owned by petitioner, Menachem Vinter. Mr. Vinter operates the gasoline station, handles all financial matters relating to the station, hires and fires the employees and signs the checks of the business.

2. At the time of the inspection the Division's investigators found 168.9 cartons of Marlboro, Newport, Winston, Kools and Parliament cigarettes with counterfeit tax stamps. These cigarettes were subsequently seized. At the time of the inspection, the store manager of the business was present. Mr. Vinter, the owner, was later contacted and requested by the investigators to come down to the station to surrender for arrest.

3. On April 9, 1997, the date of the inspection, the Division's investigators issued to petitioner four summonses for (1) criminal possession of a forged instrument pursuant to Penal Law § 170.30, (2) attempt to evade and defeat cigarette tax pursuant to Tax Law § 1814(a)(2), (3) possession of counterfeit New York State tax stamps pursuant to Tax Law § 1814(i) and (4) possession of unstamped or unlawfully stamped packages of cigarettes pursuant to Tax Law § 1814(e). The investigators also determined that petitioner did not possess a New York State certificate of registration to sell cigarettes as a retail dealer as required by Tax Law § 480-a(1)(a). On April 1, 1998, in the Supreme Court of the State of New York, County of Kings, petitioner pled guilty to attempting to evade and defeat the cigarette tax, a class B misdemeanor, and was fined \$500.00. All other summonses were dismissed.

4. On April 23, 1998, the Division issued a Notice of Determination to petitioner asserting that he was liable for a penalty in the sum of \$15,800.00. The penalty was imposed pursuant to Tax Law § 481(1)(b) at the rate of \$100.00 per carton for 158 cartons of unstamped or unlawfully stamped cigarettes. Although 168.9 cartons of unlawfully stamped cigarettes were found, Tax Law § 481(1)(b) provides that the maximum penalty of \$100.00 per carton be

imposed for every carton in excess of 10 cartons of unstamped or unlawfully stamped cigarettes. The Notice of Determination indicated that the period at issue was April 1, 1997, rather than the actual date of inspection of April 9, 1997.

5. Upon approaching petitioner's business location on April 9, 1997, the investigators noticed certain stamps which appeared to be counterfeit on packages of cigarettes stacked and displayed for sale in a locked booth. The investigators receive extensive training on how to identify counterfeit stamps and also receive bulletins which identify counterfeit stamp numbers. At the time of the inspection, the valid stamps on cigarettes were orange in color and the numbers on the stamps were made by dotted lines. The stamps on the cigarettes in the booth were a brighter orange color and the numbers on the stamps were solid lines.

6. Inside the booth, the investigators found approximately 4 cartons of counterfeit stamped cigarettes on display for sale and an open case with about 20 cartons lying on the floor. Initially, the investigators were denied access to the storage room located behind the booth because it was locked and the attendant did not have the key. After petitioner was contacted, the key to the storage room was delivered to the business location. In the storage room, the investigators found another 149 cartons of counterfeit stamped cigarettes which had been placed on shelves and mixed among properly stamped cigarettes.

7. One of the investigators questioned Mr. Vinter in an effort to ascertain the source of the counterfeit stamps. Petitioner stated that he had purchased the cigarettes from an individual named "Omar," who was the delivery person of one of the two wholesalers from which Mr. Vinter bought cigarettes. According to Mr. Vinter, Omar told him he had purchased the counterfeit stamped cigarettes from someone at the John F. Kennedy Airport in Queens, New York. Omar would not give Mr. Vinter the name of the individuals who sold him the counterfeit

stamped cigarettes for fear of reprisal. However, Omar informed the investigator that the cartons he sold to petitioner were stolen from regular deliveries that he had made. According to Omar, if a customer ordered 150 cartons, he would deliver 145 cartons to the customer and keep 5 cartons, which he would sell to petitioner at a discount.

Mr. Vinter purchased the counterfeit cigarettes to avoid a 50-cents per carton increase in the cost of cigarettes which was to go into effect soon. Mr. Vinter received this information from the wholesaler. The investigator was not able to connect the purchase of any of the 168.9 cartons of counterfeit stamped cigarettes to either of the two wholesalers from which petitioner regularly purchased cigarettes.

8. For a period of time immediately proceeding the events of April 9, 1997, petitioner's wife was seriously ill and it was necessary for petitioner to be home caring for his three young children. He was therefore not able to be at the business premises on a regular basis. During this period of time, which included the purchase of the counterfeit stamped cigarettes, Mr. Vinter operated the business from his home. He would be advised by his employees at the business as to which supplies or inventory items were running low, and he would then order the needed supplies or inventory and issue checks for their payment.

CONCLUSIONS OF LAW

A. Tax Law § 481(1)(b) provides, in pertinent part, as follows:

In addition to any other penalty imposed by this article, the commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. . . . The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty.

B. It is undisputed that counterfeit stamped cigarettes were found on the premises of the Getty Service Station owned by Meir, Inc. and were being offered for sale, which was clearly in violation of the provisions of Article 20 of the Tax Law. Accordingly, the penalty provided under Tax Law § 481(1)(b) was warranted. However, the issue remains as to whether petitioner was a person in possession of or had control of the counterfeit stamped cigarettes, thereby subjecting him to the penalty.

C. In the instant matter, the evidence adduced by petitioner is insufficient to establish that he was not in possession of or had control of the 168.9 cartons of unlawfully stamped cigarettes found at the service station. Although petitioner asserts that he was not the individual who ordered, purchased, received or sold the improperly stamped cigarettes, was not at the service station on a regular basis for a period of three weeks prior to the seizure of the counterfeit stamped cigarettes and was not present at the time of the inspection, the evidence developed herein, coupled with his actions, support a finding that he was in possession or had control of the improperly stamped cigarettes.

Initially, it is noted that petitioner was the sole owner and officer of the corporation, Meir, Inc., which owned the service station where the counterfeit stamped cigarettes were found. Petitioner operated the service station, did all the hiring and firing and handled all financial transactions including the signing of checks and the making of deposits. During the weeks preceding the seizure of the counterfeit cigarettes, petitioner was home tending to his wife and children and not regularly present at the gasoline station. However, petitioner testified that employees working at the station would telephone and advise him of any supplies or inventory which were running low. From his home, petitioner would order these items from the supplier and issue a check for payment. Although not regularly present at the service station, petitioner

continued to operate the business from his home and had full control of the ordering and purchasing of inventory for the station. As to the cigarettes at issue, petitioner claimed during the initial investigation that he purchased them from the delivery person of one of his wholesale suppliers. Petitioner also testified that he purchased the cigarettes to avoid a future price increase. At the hearing, however, he claimed that he had nothing to do with their purchase. Either way, it appears certain that petitioner was involved in the purchase of the counterfeit stamped cigarettes either directly, or through his employees. There is nothing in the record to indicate, and in fact the record indicates otherwise, that petitioner relinquished control of the operation of the service station to his employees during the weeks preceding the seizure of the counterfeit stamped cigarettes when the cigarettes were purchased and offered for sale.

It must also be noted that although petitioner was not at the station at the time the inspection began, he was the first person that store personnel called concerning the inspection. Furthermore, petitioner was the individual who surrendered to the investigators for arrest and it was petitioner who pled guilty to the attempt to evade payment of the cigarettes and tobacco tax imposed by Article 20 of the Tax Law. These actions lend further support to the conclusion that petitioner was actively involved in the operation and management of the station during the time period of the purchase and sale of the counterfeit stamped cigarettes, and is properly subject to the penalty imposed by Tax Law § 481(1)(b).

D. At the hearing, petitioner raised the issue of the amount of the penalty. As set forth above, Tax Law § 481(1)(b) gives the Commissioner the discretion to impose a penalty of *not more than* \$100.00 for each 200 cigarettes or fraction thereof in excess of 2,000 cigarettes in unstamped or unlawfully stamped packages. Here, petitioner was found to have in his possession 168 cartons or 33,600 cigarettes in counterfeit stamped packages. In apparent

reliance upon the provisions set forth above, the Division issued a Notice of Determination assessing a penalty in the amount of \$15,800.00.

E. The appropriate standard of review of a discretionary act by the Division is a de novo review standard (*Matter of OK Petroleum Products Corp.*, Tax Appeals Tribunal, November 1, 1990). Here, the Division did not present any reason why it imposed a penalty of \$15,800.00. Therefore, it is impossible to know whether the Division considered the nature, number and degree of the violation (*see, Matter of Allied Grocers Cooperative*, Tax Appeals Tribunal, November 30, 1989, *confirmed* 162 AD2d 791, 557 NYS2d 707).

The record shows that the business was in possession of 168 cartons of counterfeit stamped cigarettes when the investigators searched the premises. Clearly, this is a serious violation of the law which warrants a significant sanction. Presumably, this was the reason why the Division imposed the maximum penalty allowed by law.

The difficulty with the sanction imposed by the Division is that it does not take into account the presence of any mitigating factors. In this regard, it should be borne in mind that the statute affords the Commissioner wide latitude in determining the appropriate amount of penalty to impose. It is significant that there is no evidence that petitioner ever possessed improperly stamped cigarettes on any other occasion. Under these circumstances, it is concluded that the penalty imposed by the Division is excessive and that a penalty of \$50.00 for each 200 cigarettes or fraction thereof in excess of 2,000 illegally stamped packages, or \$7,900.00, is adequate to achieve the goals of imposing a sanction upon petitioner and deterring petitioner and others in petitioner's position from possessing unstamped cigarettes in New York State.

F. The notice of determination erroneously states that the period at issue was April 1, 1997 rather than the actual date of seizure of the improperly stamped cigarettes of April 9, 1997.

This error is not sufficient to invalidate the notice. The law in New York is clear: defects on the face of the notice will not invalidate the notice, absent evidence of harm or prejudice to the petitioner (*Matter of Agosto v. Tax Commn.*, 68 NY2d 891, 508 NYS2d 934; *Matter of Pepsico, Inc. v. Bouchard*, 102 AD2d 1000, 477 NYS2d 892; *Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin.*, Sup Ct, Albany County, March 16, 1988, *affd on other grounds* 151 AD2d 822, 542 NYS2d 61; *Matter of A & J Parking Corp.*, Tax Appeals Tribunal, April 9, 1992). Here, there is no evidence that petitioner was prejudiced by receiving a notice with the date of April 1, 1997 rather than April 9, 1997. Petitioner was well aware that the penalty being assessed was the result of the seizure by investigators of 168.9 cartons of illegally stamped cigarettes from petitioner's business premises. He was neither confused nor prejudiced by the error on the notice.

G. The petition of Menachem Vinter is granted to the extent indicated in Conclusion of Law "E" and the penalty asserted in the Notice of Determination, dated April 23, 1998, is reduced to \$7,900.00; except as so granted, the petition is otherwise denied and the Notice of Determination, as modified, is sustained.

DATED: Troy, New York
August 3, 2000

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE